Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,
Respondents,

AND

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: January 11, 1999

QUESTIONS PRESENTED

1. Does the Equal Pay Act abrogate Eleventh Amendment immunity?

2. Does Congress have the power under Section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the States absent a showing of either constitutional violations or exceptional circumstances?

PARTIES TO THE PROCEEDING

The petitioners in this case are Illinois State University, Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, The Board Of Regents, and David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski, individually and in their capacities as members of The Board of Regents. The respondents are Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated.

RULE 29.1 STATEMENT

Petitioner Illinois State University is governed by the Illinois State University Board of Trustees (formerly the Board of Regents), a body politic and corporate, which is a creation of statute and an arm of the State of Illinois. Petitioners Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski are individuals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Illinois State University, *et al.* ("ISU") hereby petition this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the circuit court is reported at 150 F.3d 706 (7th Cir. 1998). *See* Appendix ("App.") at 2a. The two opinions of the district court are reported at 972 F. Supp. 458 (C.D. Ill. 1997) and 986 F. Supp. 1107 (C.D. Ill. 1996), respectively. *See id.* at 27a and 47a. The Magistrate's Report and Recommendation is not reported. *See id.* at 39a. The October 13, 1998 Order of the Court of Appeals denying ISU's request for rehearing and suggestion for rehearing *en banc* is also not reported. *See id.* at 1a.

JURISDICTION

The ruling of the Court of Appeals was entered on July 21, 1998. *See* App. at 2a. On October 13, 1998, the Seventh Circuit denied ISU's request for rehearing and suggestion for rehearing *en banc*. *See id.* at 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

The forum selection clause of the Equal Pay Act, 29 U.S.C. § 206(d)(1), which is itself derived from the Fair Labor Standards Act, 29 U.S.C. §§ 201-216, provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). The Equal Pay Act and the relevant portions of the Fair Labor Standards Act are reprinted in their entirety in the Appendix.

STATEMENT OF THE CASE

The proceedings in the district court and the circuit court are discussed below.

A. Proceedings In The District Court

On their own behalf and on behalf of all other persons similarly situated, Plaintiffs Dr. Iris I. Varner, *et al.*

(collectively referred to herein as "Plaintiffs") filed this suit on March 13, 1995 against ISU and various of its officers and regents, alleging violations of the Equal Pay Act and seeking from ISU money damages as well as injunctive relief. On May 22, 1997, the district court certified a class that consists of all female faculty members at ISU from 1982 to the present.

Following this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), ISU moved on October 22, 1996 to dismiss Plaintiffs' Equal Pay Act claims on Eleventh Amendment grounds. On July 11, 1997, the United States Department of Justice ("DOJ") sought leave to intervene in the proceeding before the district court. On July 30, 1997 (after granting the DOJ's motion to intervene but before allowing ISU an opportunity to respond to the DOJ's submission), the district court denied ISU's motion to dismiss. *See* App. at 27a. On August 28, 1997, ISU filed a notice of appeal.

B. Proceedings In The Circuit Court

Oral argument was held by the circuit court on February 26, 1998, and on July 21, 1998, the circuit court issued its panel opinion. *See* App. at 2a. In affirming the district court, the Seventh Circuit began by reiterating the principals established by this Court in *Seminole Tribe—i.e.*, the States are immune from suit in federal court unless Congress (i) unequivocally expresses its intent to abrogate immunity in the text of the statute itself and then only if (ii) Congress has properly acted pursuant to its authority under Section 5 of the Fourteenth Amendment. *See id.* at 4a.

Although the circuit court acknowledged the principals of *Seminole Tribe*, it by no means adhered to them. In spite of this Court's requirement that evidence of intent to abrogate be found in the statute itself, the circuit court devoted much of its opinion to a discussion of the "context and history" of the Equal Pay Act, concluding that matters outside the statutory text were "helpful" in determining whether Congress intended to abrogate. *See* App. at 6a. To that end, the Seventh Circuit found that the 1974 Amendments to the Fair Labor Standards

Act (and by extension the Equal Pay Act) were intended as a "response" to this Court's decision in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 284-86 (1973).[1] Based on that interpretation of the events surrounding the passage of the 1974 amendments, the circuit court found evidence of intent to abrogate. *See id.* at 6a-8a.

The circuit court next looked at the statute itself. *See* App. at 8a. The circuit court, however, rested its entire textual analysis on the fact that the 1974 amendments to the Fair Labor Standards Act (i) defined "employees" to include both federal and state employees and (ii) allowed those individuals to file suit against their "employers" in "any Federal or State court of *competent jurisdiction.*" *See id.* (emphasis added). While the circuit court acknowledged in passing this Court's prior ruling that "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," the circuit court nonetheless concluded under its own precedents that any further "degree of explicitness is not required," never considering how a federal court is a "court of competent jurisdiction" in those instances where a State is a party. *See id.* at 9a (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985)). The circuit court likewise acknowledged this Court's prior holding that even the creation of a cause of action against a State is insufficient evidence of intent to abrogate, but again, the circuit court took another path. *See id.* at 8a-9a (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991)). Accordingly, the circuit court found that the first prong of the *Seminole Tribe* test was met.

The circuit court also found that the second prong of the *Seminole Tribe* test had been satisfied, ruling that Congress had the power under the Fourteenth Amendment to prohibit what

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[1] The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act. Both pieces of legislation share definitions and enforcement provisions. *See* 29 U.S.C. §§ 201-216.

amounts to constitutional state action. *See* App. at 10a-23a. More specifically, the circuit court rejected ISU's argument that because liability attaches under the Equal Pay Act without any showing of intentional discrimination, the Equal Pay Act proscribes constitutional state action and is, therefore, not proper "remedial" legislation under the Fourteenth Amendment. *See id.* at 19a-23a.

The circuit court began its analysis by noting that this Court had rejected in *Boerne* any notion that Congress has "substantive" legislative powers under the Fourteenth Amendment. *See* App. at 19a-20a (citing *City of Boerne v. Flores*, -- U.S. --, 117 S. Ct. 2157, 2163-64 (1997)). The circuit further acknowledged that ISU's reading of *Boerne* was not "without some appeal." *See id.* at 20a. The circuit court, however, had considerable difficulty distinguishing between "substantive" and "remedial" legislation, concluding that a lack of uniformity in the way the terms were applied had led to a disarray in the various courts of appeals:

> The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray.

Id. at 20a n.12.

In spite of the disarray, the circuit court ultimately ruled that since the Equal Pay Act was intended to remedy the "serious and endemic problem of employment discrimination in *private industry*," the statute is not "out of proportion to the harms that Congress sought to redress." *See* App. at 21a-22a (emphasis added). Accordingly, the circuit court attempted to meet the requirements of *Boerne* by relying on a congressional finding of discrimination in *private industry* in order to justify the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 21a. No further explanation was given by the circuit court as to why a finding about private industry should have any bearing at all on whether the States had violated the Fourteenth

Amendment, let alone serve as a basis for abrogation of Eleventh Amendment immunity.

In light of the foregoing, ISU filed with the circuit court a request for rehearing and a suggestion for rehearing *en banc*.[2] *See* App. at 1a. ISU's request for rehearing was denied by the circuit court without opinion on October 13, 1998. *See id.*

ISU now requests that this Court issue a writ of certiorari in order to review the decision of the circuit court.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has given clear directives to the circuit courts on the proper analysis of Eleventh Amendment immunity. By and large, those directives are not being followed. This is most certainly a case in point. Here, the circuit court acted in direct conflict with this Court's prior rulings on at least two different issues.

First, the circuit court's analysis of congressional intent to abrogate was based largely on an impermissible analysis of legislative history and statutory context. The only textual analysis performed by the circuit revealed no evidence of intent, and the circuit did not even consider the fact that Congress itself expressly limited suits under the Equal Pay Act to courts of "competent jurisdiction." In fact, the circuit court's reading of the Equal Pay Act was so cursory and illogical that it would have the unintended consequence of subjecting the federal government to suit in state court on *any* claim made under the Fair Labor Standards Act, a result that not even the circuit could

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2 While ISU's petition for rehearing was pending, the Eighth Circuit reached the opposite conclusion the Seventh Circuit had reached in this case. *Compare Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir. 1998) *with* App. 2a-26a. The Eighth Circuit ruled in *Humenansky* that Congress had exceeded its Section 5 power in passing the Age Discrimination in Employment Act. *See Humenansky*, 152 F.3d at 828. The *Humenansky* decision was promptly brought to the attention of the Seventh Circuit. Hence, the "disarray" noted by the circuit court in its opinion in this case has only grown deeper since that opinion was issued.

believe was intended by Congress. Accordingly, the circuit court acted in a manner that is directly at odds with this Court's rulings in *Atascadero* and *Dellmuth*.

Second, the circuit court failed to follow this Court's rulings in *Boerne* and *Katzenbach*. The circuit court found that under the Fourteenth Amendment, Congress has the authority to abrogate the Eleventh Amendment immunity of the States based on nothing more than a finding of employment discrimination in *private industry*. That finding can, of course, not possibly serve as a basis under the Fourteenth Amendment for abrogating Eleventh Amendment immunity. Even worse, the circuit court never addressed the forum selection clause of the Equal Pay Act nor did it so much as consider how allowing States to be sued in federal court could conceivably meet the "congruence and proportionality" test of *Boerne*. Thus, the circuit court came to the opposite result required by *Boerne* and *Katzenbach*, and in so doing, it denied the State of Illinois the right to Eleventh Amendment immunity to which it is entitled under the Constitution.

We elaborate below.

I. THE CIRCUIT COURT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE DISPOSITIVE ISSUE OF CONGRESSIONAL INTENT

As noted above (*see* disc. *supra* at 3), this Court established a two-prong test for abrogation in *Seminole Tribe*. *See Seminole Tribe*, 517 U.S. at 55. Under the first prong of that test, abrogation can be found if and only if Congress has expressed in the statute itself an "unmistakably clear" expression of intent to abrogate. *See id.* at 55-56. The circuit court, however, failed to find the required expression of intent. In so doing, the circuit court acted in a manner that is directly at odds with this Court's precedents, thereby denying ISU of its right to Eleventh Amendment immunity. Moreover, the circuit court set a precedent that will now allow the federal government to be sued in state court for any violation of the Fair Labor

Standards Act, thereby opening the floodgates for scores of suits to be brought against the United States in the courts of the States.

A. Clear And Unambiguous Evidence Of Intent To Abrogate Must Be Found In The Statute Itself

This Court has repeatedly held that in order to abrogate Eleventh Amendment immunity, congressional intent must be "unmistakably clear in the language of the statute." *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Such evidence must be both "textual" and "unequivocal." *See id.* at 230; *see also Atascadero*, 473 U.S. at 243. If the text of the statute does not make it absolutely clear that Congress intended to abrogate, then the abrogation inquiry stops there. *See id.* Any ambiguity compels a finding of no abrogation. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *see also Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998) (language supporting abrogation must be "clear as the summer sun").

Because evidence of intent must be found in the statute itself, recourse to materials outside the statute is neither necessary nor appropriate. *See, e.g., Dellmuth*, 491 U.S. at 230. As this Court has held on numerous occasions, analysis of legislative history plays no role whatsoever in the required analysis. *See, e.g., id.* Similarly, review of the statutory "structure" is of no relevance. *See, e.g., id.* If the statute itself does not reflect "clear" and "unambiguous" evidence of intent, then nothing in the legislative history or the structure of the statute is of any consequence. *See, e.g., id.*; *see also Nordic Village*, 503 U.S. at 37.

B. The Only Textual Basis Identified By The Circuit Court Has Long Since Been Rejected By This Court As A Basis For Abrogation

The circuit court was able to identify little or no textual support for abrogation. *See* App. at 7a-9a. It was for that reason that the circuit court was forced to rely on the legislative history and the statutory structure of the Equal Pay Act. *See*

disc. *infra* at 15-16. Misplaced as it was, however, that reliance does not and cannot obscure the lack of any clear evidence of intent to abrogate in the Equal Pay Act itself.

Unlike a number of federal statutes that explicitly abrogate Eleventh Amendment immunity, the Equal Pay Act does not even mention the Eleventh Amendment, sovereign immunity or abrogation. *Compare* Equal Pay Act, 29 U.S.C. § 216(b), *with, e.g.*, Copyright Act, 17 U.S.C. § 511(a) *and* Age Discrimination in Employment Act, 42 U.S.C. § 12202; *see also, e.g., Kimel*, 139 F.3d at 1430-31 (giving weight to the fact that the Age Discrimination in Employment Act contains "no reference to the Eleventh Amendment or to states' sovereign immunity"). Quite to the contrary, the Equal Pay Act is entirely silent on the issue, placing it in sharp contrast to the statutes that contain the necessary expression of intent. *See, e.g.*, 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

Given the absence of any direct textual evidence of intent to abrogate, the circuit court relied instead upon language in the Equal Pay Act that "authorizes 'employees' to sue 'public agencies'" in any "Federal or State court of *competent jurisdiction.*" *See* App. at 8a (emphasis added). This clause was the sum total of the "evidence" found by the circuit for intent to abrogate. *See id.* Under this Court's precedents, however, that clause scarcely constitutes "unmistakably clear" evidence of intent.

1. In Limiting Suits To Courts Of "Competent Jurisdiction," Congress Provided No Evidence Of Intent To Abrogate Eleventh Amendment Immunity

On its face, the clause relied upon by the circuit court simply does not amount to an unambiguous expression of intent. Congress only authorized suit in courts of "competent jurisdiction." *See* 29 U.S.C. § 216(b). In light of the Eleventh

Amendment, however, a federal court is plainly not a court of "competent jurisdiction" for a suit brought against a State. *See United States v. Morton*, 467 U.S. 822, 828 (1984) (the term "competent jurisdiction" generally refers to subject matter jurisdiction); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Eleventh Amendment is a jurisdictional limit on the federal courts); *Atascadero*, 473 U.S. at 243 (same).

Significantly, the circuit court did not consider the meaning of the phrase "competent jurisdiction." *See* App. at 6a-9a. That phrase, however, must be accounted for in any meaningful assessment of congressional intent. *See, e.g., Walters v. Metropolitan Educ. Enter., Inc.*, --U.S.--, 117 S. Ct. 600, 664 (1997) (statutes must be interpreted to give each word effect). By including the phrase "court of competent jurisdiction," Congress was by no means signaling an "unequivocal" intent to upset the general rule (as reflected in the Eleventh Amendment) that the States are not subject to suit in federal court. *See, e.g., Atascadero*, 473 U.S. at 242-43. If anything, Congress was doing just the opposite. *See, e.g., Kimel*, 139 F.3d at 1432 n.11 ("[A] federal court lacks 'competent jurisdiction' if the Eleventh Amendment prohibits the suits against the State."). The inclusion of the phrase in the statute is a fairly clear indication that the Eleventh Amendment was not being abrogated. *See, e.g., id.*; *see also, e.g., Employees*, 411 U.S. at 281. What else could it mean?

At most, the phrase "court of competent jurisdiction" makes the statute ambiguous as an indicator of congressional intent to abrogate. Under this Court's precedents, however, ambiguity compels the converse of the result reached by the circuit court. *See Atascadero*, 473 U.S. at 240 (abrogation only found when mandated "by the most express language or by [] overwhelming implication from the text"). If there is ambiguous evidence of intent to abrogate, then there is no abrogation. *See, e.g., Nordic Village*, 503 U.S. at 37 (congressional intent to abrogate must be "unambiguous").

That is the rule set down by this Court but ignored by the circuit court. *See, e.g., Atascadero*, 473 U.S. at 240.

2. The Statutory Language Relied Upon By The Circuit Court Is Nothing More Than A General Authorization For Suit Against The States

In truth, the statutory language relied upon by the circuit court amounts to nothing more than the creation by Congress of a right of action against the States. *See* 29 U.S.C. § 216(b); *see also Kimel*, 139 F.3d at 1432 n.11. This Court, however, has explicitly rejected the argument that the creation of a cause of action is adequate evidence of intent to abrogate. *See Hilton*, 502 U.S. at 206. In *Hilton*, the Court drew a clear distinction between (i) the creation of a cause of action against the States *and* (ii) the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 205-06. The two inquiries are separate and distinct, and as reflected in *Hilton*, a cause of action can be created without any abrogation of Eleventh Amendment immunity.[3] *See id.*

There is obviously a fundamental difference between the issue of *where* a State may be sued and the issue of *whether* it may be sued. *See Hilton*, 502 U.S. at 205-06; *see also Welch*, 483 U.S. at 473. The circuit court, however, conflated the two.

ISU has never contested the fact that the Equal Pay Act creates a cause of action against the States. Rather, the issue here is whether in light of the Eleventh Amendment, such a claim may be brought in federal court.[4] Contrary to the

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[3] In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 476 (1987), this Court ruled that the Jones Act did *not* abrogate Eleventh Amendment immunity. The State of South Carolina then argued in *Hilton* that because there was no abrogation, there was necessarily no creation of a cause of action against the States. *See Hilton*, 502 U.S. at 203-04. This Court, however, rejected that argument, finding creation and abrogation to be separate and distinct. *Compare id.* at 206 *with* App. at 8a.

[4] It is now well settled that a state employee having a claim under the other provisions of the Fair Labor Standards Act must pursue that

(continued...)

conclusion reached by the circuit court, the fact that Congress created a cause of action against the States is in no way dispositive. *See Hilton*, 502 U.S. at 206. That is the clear holding of *Hilton*. *See id.*

By disregarding the foregoing precedents, the circuit court deprived ISU of its constitutional right to Eleventh Amendment immunity. Congress did create a cause of action against ISU in amending the Equal Pay Act in 1974. That cause of action, however, can and should be brought in the courts of the State of Illinois, in deference to the vital interests implicated by the Eleventh Amendment. *See, e.g., Welch*, 483 U.S. at 473 (a "State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued").

C. The Circuit Court's Interpretation Of The Equal Pay Act Would Lead To Incongruous Results

The serious infirmities in the textual analysis performed by the circuit court are made all the more clear by the obvious consequences of its reading of the Equal Pay Act. Under that reading, Congress would not only have abrogated Eleventh Amendment immunity, but it would have also allowed claims against the *federal* government to be brought in *state* courts.[5]

The circuit court concluded that because the Equal Pay Act authorizes suits by "employees" against "public agencies" in "any Federal or State court of competent jurisdiction," there is "little difficulty" in finding that Congress intended to abrogate.

(...continued)

claim in state court and not federal court. *See, e.g., Aaron v. Kansas*, 115 F.3d 813, 816-18 (10th Cir. 1997); *see also* App. at 10a n.5 (listing cases). Since it is also part of the Fair Labor Standards Act, why should the Equal Pay Act be any different? Moreover, there certainly is nothing extraordinary about Congress creating a cause of action against the States that is enforceable only in state court. *See, e.g., id.* Claims against the States under the Fair Labor Standards Act are pursued every day in state courts throughout the country, and no one is any worse for the wear. *See, e.g., Aaron*, at 817-18.

5 Relevant portions of the Fair Labor Standards Act are reprinted in the Appendix at 57a-60a.

See App. at 8a (emphasis omitted). The Equal Pay Act's definition of "employees," however, also includes employees of the federal government, and the statutory definition of "public agencies" likewise includes the federal government. *See* 29 U.S.C. § 203(e)(2)(A); 29 U.S.C. § 203(x). This is made very clear by the statute itself:

> "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x). Thus, the Equal Pay Act treats federal and state governments identically. It creates for employees of both a cause of action against their employer in "any Federal *or State court* of competent jurisdiction." *See* 29 U.S.C. § 216(b) (emphasis added).

If Congress really intended to abrogate Eleventh Amendment immunity in the Equal Pay Act, then it necessarily follows that Congress also intended to waive the federal government's immunity to suit in state court by providing that suits against the federal government may be brought in either "Federal or State court."[6] *See* 29 U.S.C. § 216(b). After all, the standard for abrogation of the federal government's

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[6] The full text of the forum selection clause in the Equal Pay Act is as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). Given this language, it is obvious that the circuit court's reading of the Equal Pay Act necessarily means that the federal government can be sued in state court. *See id.*; *see also United States v. King*, 395 U.S. 1, 4 (1969) (identical standard for abrogation of state and federal immunity).

immunity is identical to the standard for abrogation of the Eleventh Amendment. *See King*, 395 U.S. at 3. There must be an "unequivocal" expression of intent to abrogate for both. *See, e.g., id.*

It could scarcely be suggested that the Equal Pay Act "plainly" eliminates the federal government's immunity to suit in state court.[7] Yet there is absolutely no more textual evidence that Congress intended to eliminate the Eleventh Amendment immunity of the States. On the circuit court's reading of the statute, both conclusions are as inescapable as they are illogical.

If not corrected, the holding of the circuit court would have widespread implications. The federal government would be amenable to suit in state court not only under the Equal Pay Act but also under the many other provisions of the Fair Labor Standards Act, including its wage and overtime provisions. *See* App. at 57a-60a. Hundreds of cases against the federal government that are now litigated in federal court will be able to be litigated in state court, with the incongruous result that the federal government will have to defend itself in the courts of another sovereign.

In reality, of course, the Equal Pay Act clearly does not contain "unequivocal textual" evidence that Congress intended to abrogate the immunity of *either* the States or the federal government. Quite the opposite, it merely creates a right of action against both federal and state governments, without suggesting any intent to eliminate the traditional defenses afforded sovereigns for suits brought in the courts of another sovereign. *See* 29 U.S.C. § 216(b); *see also Dellmuth*, 491 U.S. at 229-30; *Hilton*, 502 U.S. at 206. The reasoning relied upon by the circuit court simply cannot support a finding of

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[7] At oral argument before the circuit court, counsel for the United States (as intervenor) advanced the argument on intent that was ultimately accepted by the circuit court, but the United States was by no means willing to concede that the Equal Pay Act allows federal employees to sue the federal government in state court. No other result, however, can square with the circuit court's reading of the statute.

abrogation of either of Eleventh Amendment immunity or the sovereign immunity of the United States. *See, e.g., Dellmuth*, 491 U.S. at 230-32; *see also King*, 395 U.S. at 4.

Interpretations of statutes that lead to illogical or absurd results are to be avoided. *See, e.g., Clinton v. City of New York*, -- U.S. --, 118 S. Ct. 2091, 2098 (1998). The circuit court, however, provided nothing more.

D. By Relying Upon Matters Outside The Text Of The Statute, The Circuit Court's Decision Conflicts With This Court's Prior Precedents

The circuit court was able to find no dispositive textual support for abrogation. *See* App. at 6a-9a. It was for that reason that it devoted so much of its opinion to a discussion of the legislative history and structure of the Equal Pay Act. *See id.* at 6a-8a.

Indeed, the circuit court made no bones about the nature of its inquiry. In the very first sentence of its discussion of congressional intent, the circuit court made the following statement:

> In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, *it is helpful to consider the context and history of the statute*.

App. at 6a (emphasis added). The circuit court then proceeded to identify the 1974 amendments to the Fair Labor Standards Act (and by incorporation the Equal Pay Act) as a "response" to this Court's decision in *Employees*. *See id.* at 7a (citing *Employees*, 411 U.S. at 284-86).

The circuit court's conclusion can, of course, only be derived from a review of materials outside the statute, and by the Seventh Circuit's own admission, that analysis played a pivotal role in its conclusion that Congress intended the 1974

Amendments to abrogate Eleventh Amendment immunity.[8] *See* App. at 6a-7a.

As such, the opinion of the circuit court rests on an impermissible basis and is at odds with the precedents of this Court. By this Court's clear directives, the circuit court's analysis of context and history has no role whatsoever in a proper analysis. *See, e.g., Dellmuth*, 491 U.S. at 230; *see also Nordic Village*, 503 U.S. at 1016. The circuit court was only compelled to look at the legislative history and context because the required textual support was lacking. *See* App. at 6a-9a; *see also Dellmuth*, 491 U.S. at 230 (if it is necessary to resort to legislative history, then by definition the text of the statute is insufficiently clear to support abrogation).

E. The Circuit Court's Failure To Follow This Court's Precedents Plainly Warrants The Granting Of Certiorari

The failure of a court of appeals to follow the precedents of this Court is a well recognized basis for granting certiorari. *See, e.g.*, SUP. CT. R. 10(1)(c); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982). That is all the more true where the issue involved is the Eleventh Amendment and where the upshot of failing to follow precedents is the denial of a State's Eleventh Amendment immunity. *See, e.g., Dellmuth*, 491 U.S. at 227-28 ("[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States . . . .").

As this Court has so often recognized, the Eleventh Amendment is of critical importance to our federalism. *See*,

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[8] Later in its opinion, the circuit court did suggest in a footnote that its lengthy analysis of legislative history played no role in its assessment of intent. *See* App. at 7a n4. That disclaimer, however, is directly at odds with the circuit court's earlier acknowledgment that "it is helpful to consider the context and history of the statute." *See id.* at 6a. In addition, it is at odds with common sense. If the circuit court viewed legislative history and context as irrelevant, then why did it devote the better part of its discussion of intent to those matters?

e.g., *Atascadero*, 473 U.S. at 242. It is a "fundamental" rule of jurisprudence that plays a "vital role" in the federal system. *See id.* It does no less than establish the "constitutional balance between the Federal Government and the States." *See id.* Moreover, it is a limitation on the federal judicial power conferred by Article III of the Constitution. *See*, *e.g.*, *Pennhurst*, 465 U.S. at 98.

Considering the importance of the interests that are implicated, the failure of a circuit court to follow the precedents of this Court in addressing Eleventh Amendment immunity should not be allowed to go unchecked. The State of Illinois is entitled to a full consideration of the issue of immunity in a manner consistent with the law established by this Court. That has yet to occur, and only this Court can rectify the problem.

II. IN CONCLUDING THAT THE FOURTEENTH AMENDMENT IS A PLENARY SOURCE OF POWER FOR REGULATING CONSTITUTIONAL STATE ACTION, THE CIRCUIT COURT FUNDAMENTALLY MISAPPLIED *BOERNE* AND *KATZENBACH*

In the wake of *Seminole Tribe* and then *Boerne*, a number of courts have been asked to address the power of Congress to abrogate Eleventh Amendment immunity under the Fourteenth Amendment. As the circuit court noted in this case, however, the decisions rendered have led to a "disarray" among the circuits. That characterization by the circuit court is actually somewhat charitable.

Particularly in the area of employment law, the circuit courts as well as the district courts have had a very difficult time applying *Seminole Tribe* and *Boerne*. The result has been that there is little consistency in the results of their analyses or in the rationales utilized. Further guidance from this Court is most certainly called for, especially since it involves a matter of considerable importance.

The proper resolution of this issue often dictates (as it did here) whether or not a State will be subject to suit in federal court. On a matter as significant as the Eleventh Amendment,

the disarray noted by the circuit court cannot be allowed to persist. The determination of whether a State is subject to suit in federal court obviously should not depend on the fortuity of what circuit that State happens to be in.

A. The Standard Set By This Court In *Katzenbach* And *Boerne*

The Fourteenth Amendment prohibits state action that "den[ies] to any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment is largely self-executing, Section 5 of the Fourteenth Amendment does grant Congress the "remedial" power to pass legislation to "enforce" the provisions of the Amendment. *See* U.S. CONST. amend. XIV, § 5; *see also Boerne*, 117 S. Ct. at 2164-67.

In *Boerne*, this Court addressed the limits of Congress' power to regulate state action under Section 5, ruling that the legislative authority of Congress is strictly limited to legislation that is "remedial" in effect. *See Boerne*, 117 S. Ct. at 2164-67. Conversely, this Court rejected any suggestion that the Fourteenth Amendment gives Congress the power to enact substantive legislation. *See id.*

As recognized in *Boerne*, the authority of Congress to pass legislation under the Fourteenth Amendment is limited to enforcing and punishing actual constitutional violations, as those violations are themselves defined by the federal courts. *See Boerne*, 117 S. Ct. at 2164. If such a limitation were not imposed, Congress would no longer be enforcing the Fourteenth Amendment but would instead be defining for itself what does and does not amount to a constitutional violation. *See id.* at 2164, 2168.

This Court's decision in *Boerne* was, of course, an outgrowth of its earlier decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Katzenbach*, this Court held that the Voting Rights Act was appropriate legislation under the provisions of the Fifteenth Amendment, notwithstanding the fact that some of its provisions prohibited

what was otherwise constitutional state action. *See Boerne*, 117 S. Ct. at 2163, 2166-68. Although the Court in *Katzenbach* upheld bans on practices that were not unconstitutional on their face (*e.g.*, literacy tests), it did so only after satisfying itself that extensive congressional findings demonstrated these practices were in fact applied discriminatorily and intentionally so as to prevent the enjoyment of the basic right to vote secured by the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 333-35.

In particular, the Court found that in enacting the Voting Rights Act, Congress was faced with "extraordinary" circumstances, including "nearly a century of systematic resistance" to basic constitutional guarantees. *See Katzenbach*, 383 U.S. at 328, 335 ("exceptional conditions can justify legislative measures not otherwise appropriate"). In *Katzenbach*, this Court expressly based its decision on the extraordinary conditions that then prevailed in certain areas of the South. *See id.* at 308-13. The Court recognized those conditions as,

> an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.

Id. at 309. It was, therefore, those "exceptional conditions" that warranted the exception to the general rule (*i.e.*, that Congress generally has no authority under the Fourteenth or Fifteenth Amendments to regulate constitutional state action).[9]

Boerne reaffirmed that the "exceptional conditions" that warranted the outcome in *Katzenbach* are truly exceptional and will only occur in the rarest of cases. *See Boerne*, 117 S. Ct. at 2169-70. The regulation of constitutional state action under the

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[9] Although *Katzenbach* involved the Fifteenth Amendment rather than the Fourteenth Amendment, this Court recognized in *Boerne* that *Katzenbach* is the most authoritative pronouncement on the scope of Congress' legislative authority under the enforcement clauses contained in the Civil War Amendments. *See Boerne*, 117 S. Ct. at 2166-67, 2169-70.

Fourteenth Amendment will only be tolerated when the legislation in question is "adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." *See id.* at 2170. Moreover, any attempt to regulate constitutional state action under the guise of the Fourteenth Amendment must necessarily meet the test of "congruence and proportionality," such that the means adopted are carefully tailored to address the specific injury that is to be prevented. *See id.* at 2164. Any legislation that does not meet these standards is properly considered "substantive" and outside the permissible scope of the Fourteenth Amendment. *See id.*

As demonstrated below (*see* disc. *infra* at 21-23), the Equal Pay Act does not begin to satisfy the requirements of *Katzenbach* and *Boerne*, and in reaching a contrary conclusion, the circuit court acted in a manner directly in conflict with this Court's rulings.

B. The Equal Pay Act Prohibits Constitutional State Action

Under the standards set by this Court, there can be no doubt that the Equal Pay Act is not valid legislation under the Fourteenth Amendment. As an initial matter, there is no dispute that the Equal Pay Act prohibits constitutional state action. *See* App. at 19a. The circuit court has itself repeatedly held that the Equal Pay Act "creates a type of strict liability in that no intent to discriminate need be shown." *See, e.g., Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (quoting *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985)). Under the Equal Pay Act, any difference in employment outcomes between women and men establishes a *prima facie* violation. *See id.* Liability may thus be imposed without any showing whatsoever of intentional discrimination. *See, e.g., id.* Moreover, under this strict liability regime, punitive damages may be assessed unless the defendant can affirmatively demonstrate its own good faith. *See, e.g., Joiner v. City of Macon*, 814 F.2d 1537, 1538-39 (11th Cir. 1987) (an employer who violates the Equal Pay Act is liable for liquidated

damages unless it can prove that its violation was in good faith and based upon reasonable grounds).

In sharp relief to the terms of the Equal Pay Act, this Court has consistently held that intent is a touchstone of any form of unconstitutional discrimination.[10] *See Washington*, 426 U.S. at 244-45. Only "*purposeful* [gender] discrimination . . . offends the Constitution." *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (emphasis added). Stated otherwise, the Constitution is only violated when a decision maker "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See id.* at 279. The Constitution, therefore, requires purposeful discrimination, whereas the Equal Pay Act plainly does not. As such, the Equal Pay Act clearly proscribes conduct that is not unconstitutional.

C. The Circuit Court Failed To Apply The *Boerne* Test

In its opinion below, the circuit court itself admitted that the Equal Pay Act "proscribes some constitutional conduct." *See* App. at 21a. Under *Boerne*, however, that necessarily means that the Equal Pay Act could only be justified if it was a tailored response to address a specific constitutional violation by the States themselves. *See Boerne*, 117 S. Ct. at 2164, 2168. Evidence of general societal discrimination would not begin to meet the standard set in *Boerne*. *See id.* at 2168-69; *see* disc. *infra* at 27-28.

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[10] By its very terms, the Equal Pay Act allows a finding of discrimination based solely on disparate impact. *See* 29 U.S.C. § 206(d)(1). More than twenty years ago, however, this Court explicitly rejected the notion that disparate impacts violate the Fourteenth Amendment absent evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 245-48 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977). In this important respect, the Equal Pay Act is strikingly similar to the Religious Freedom Restoration Act (the statute invalidated in *Boerne*) -- Congress seeks to justify under its Fourteenth Amendment authority legislation that directly contradicts this Court's governing precedent regarding the scope of the Fourteenth Amendment. *See Boerne*, 117 S. Ct. at 2160-61.

The circuit court found no evidence whatsoever that in passing the 1974 Amendments to the Fair Labor Standards Act, Congress identified any instances of violations of constitutional rights by the States. *See* App. at 20a-22a. Instead, the goal of Congress in adding the amendments was (as recognized by the circuit court) simply to apply the minimum wage and overtime provisions of the Fair Labor Standards Act to state employees, which provisions ironically can only be enforced against the States in state court. *See id.* at 15a; *see also Aaron*, 115 F.3d at 816-18. In fact, the Seventh Circuit found only one reference to the Equal Pay Act in the Senate Committee's report, and that reference was in the discussion of the statute's historical background. *See* App. at 15a.

Unable to find any evidence of constitutional violations by the States, the circuit court instead found that Congress enacted the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of employment *discrimination in private industry*." *See* App. at 21a (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)) (emphasis added). This finding by the circuit court is really quite extraordinary, as it could not possibly justify the regulation of behavior by the States. *See* U.S. CONST. amend. XIV (prohibiting certain kinds of *state action*); *see also Boerne*, 117 S. Ct. at 2169-70 (relying entirely on the lack of discrimination by the States themselves in determining that the Religious Freedom Restoration Act was improper substantive legislation).

Evidence of discrimination in private industry is simply irrelevant to the Fourteenth Amendment, and it is certainly not a proper justification for prohibiting otherwise constitutional behavior by the States. *See Boerne*, 117 S. Ct. at 2168-69 (relying entirely on state action). When legislation cannot be justified by the slightest evidence of unconstitutional behavior by the States, it is extremely difficult to understand how such legislation could be considered a "proportional and congruent"

remedy designed to prevent identified constitutional violations.[11]

Before being deprived of its right to Eleventh Amendment immunity, the State of Illinois is entitled to a proper determination of whether Congress made any finding that the States themselves have violated the constitutional rights of their citizens. No evidence was offered (nor is there any) that the State of Illinois has intentionally engaged in gender discrimination. The conclusion by the circuit court that a finding of discrimination in *private industry* would suffice is, therefore, palpably insufficient. If *Katzenbach* and *Boerne* are to mean anything, the circuit court's analysis cannot be allowed to stand.

D. The Circuit Court Failed To Address The Specific Statutory Provision At Issue Here

For the reasons set forth above (*see* disc. *supra* at 21-23), the Equal Pay Act as a whole does not and cannot meet the test articulated by this Court in *Boerne*. That conclusion is all the more inescapable, however, when one considers the specific provision of the Equal Pay Act that is at issue in this matter, namely the forum selection clause. Tellingly, the circuit court did not even bother to apply the *Boerne* test to that provision, choosing to instead speak of the statute in generic terms. *See* App. at 20a-22a.

The provision of the Equal Pay Act that the circuit court found to abrogate Eleventh Amendment immunity was, of course, the forum selection clause. *See* App. at 8a. The forum selection clause of the Equal Pay Act, however, is in no way,

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[11] Any notion that Congress has the power to pass Fourteenth Amendment legislation merely because it is "consistent" with "Fourteenth Amendment values" can only be sustained if one assumes "that Congress can define rights wholly independent of [the Supreme Court's] case law." *See Humenansky*, 152 F.3d at 826-27 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 262-263 (1983) (Burger, C.J., dissenting)). Such a finding, however, would "fundamentally alter[] our scheme of government." *See id.*; *see also Boerne*, 117 S. Ct. at 2168.

shape or form a "proportional or congruent" response to any identified harm. In fact, the circuit court did not even examine under *Boerne*'s "congruence and proportionality" test the very provision of the Equal Pay Act that it found requires the States to defend themselves in federal court. *See id.* at 20a-22a. Nowhere in its opinion does the circuit court address whether the Equal Pay Act's forum selection clause could possibly be justified under *Boerne*'s ends-and-means calculus.[12] *See id. But see Katzenbach*, 383 U.S. at 315-37 (examining each provision of the Voting Rights Act individually). The circuit court's opinion is just silent on the issue. *See* App. at 20a-22a.

Had the circuit court considered whether the forum selection clause is a remedy "proportional" to the harm it purports to correct, it is incontestable that that provision would have failed the test. *See Boerne*, 117 S. Ct. at 2164 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). The only effect of abrogation is to require the States to defend themselves in federal court rather than state court. But neither the Seventh Circuit nor any of the circuit courts that have addressed statutes in the wake of *Boerne* have suggested that a federal forum is necessary (or even desirable) to prevent or remedy any injury.[13]

There is, to the contrary, every reason to believe that state courts are fully capable of resolving the types of claims at issue

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[12] Obviously, each of the Equal Pay Act's provisions must be considered under *Boerne*'s "congruence and proportionality" test. After all, the Fourteenth Amendment is the source of authority for each provision. In *Katzenbach*, for instance, this Court carefully examined each contested provision of the Voting Rights Act. *See Katzenbach*, 383 U.S. at 315-37. Rather than granting a blanket endorsement of the entire statutory scheme proposed by Congress, each provision was considered individually by this Court to ensure that each provision was a properly circumscribed tool for the limited purpose of preventing violations of the Fourteenth Amendment. *See id.* The same is required here.

[13] Plaintiffs have likewise never suggested (nor could they) that a state forum would be in any way hostile to their claims.

in this case. Like Illinois, virtually every State has strong anti-discrimination laws of their own.[14] For example, the Constitution of the State of Illinois affirmatively prohibits discrimination on the basis of gender by state and local governments. *See* App. at 61a.[15] Moreover, the Illinois Human Rights Act outlaws employment discrimination and sexual harassment by any employer, including the State and its instrumentalities. *See id.* at 62a-79a. Given these provisions, no one could seriously claim that the courts of the State of Illinois are in any way hostile or unsympathetic to the sorts of claims being made by Plaintiffs in this case. *See id. at* 61a-79a.[16] In fact, it is undisputed that state courts would provide Plaintiffs with a full and fair opportunity to be heard. *See id.*

The complete absence of any suggestion (let alone evidence) that Illinois state courts are not a suitable forum for Plaintiffs' claims calls into serious question the circuit court's conclusion that the Equal Pay Act is itself a "congruent and proportional" remedy to a legitimate Fourteenth Amendment injury. *See* App. at 17a-22a. Since the only effect of the circuit court's determination is the abrogation of Eleventh Amendment immunity, it surely cannot be said that consideration of the need for a federal forum is irrelevant in determining whether the statute is "congruent and proportional" to its ends. That question, left entirely open by the circuit court's opinion, is deserving of an answer, especially given the importance of the

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[14] Forty-one States (including Illinois) have their own civil rights acts and/or equal pay acts. *See, e.g.*, 775 ILCS 5/1-101, *et seq.*, App. at 62a-79a; W. Va. Code Sec. 5-11-9; La. Rev. Stat. Ann. Sec. 301-334; Iowa Code Sec. 216.1-216.20; Utah Code Ann. Sec. 34A-5-106.

[15] Relevant portions of the Constitution of the State of Illinois and the Illinois Human Rights Act are reprinted in the Appendix at 61a-79a.

[16] Indeed, this Court has oft recognized that state courts and their judges are the equal of their federal counterparts. *See, e.g., Atascadero*, 473 U.S. at 238 n.2 ("It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.").

Eleventh Amendment. That answer, however, must come from this Court.

E. The Disarray In The Circuits Is An Independent Reason For Granting Certiorari

As the circuit court acknowledged, the uncertainty over the proper application of this Court's decision in *Boerne* has led to "disarray" in the courts of appeals. *See* App. at 20a n.12. The decisions fall into two groups.

1. The Conflicting Decisions

One group of decisions has interpreted *Boerne* to only require a general finding *of societal discrimination* in order to pass muster as "remedial" legislation under the Fourteenth Amendment. *See* App. at 21a (Equal Pay Act passed "to remedy what was perceived to be a *serious and endemic problem of employment discrimination in private industry*.") (emphasis added); *see also Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 305-07 (6th Cir. 1998); *Kimel*, 139 F.3d at 1437-44 (Hatchett, C.J., concurring in part and dissenting in part); *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 436 (5th Cir. 1998); *Humenansky*, 152 F.3d at 830 (Bataillon, J., dissenting). According to these decisions, once *discrimination* is documented (be it private or public), Congress has wide latitude to fashion remedies that address the problem of societal discrimination. *See Kimel*, 139 F.3d at 1439. Those remedies may then be applied against the States pursuant to the Fourteenth Amendment power, unless they are somehow "disproportionate" to the general societal discrimination that they are designed to address. *See, e.g.*, App. at 22a (finding that the Equal Pay Act's "statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination" and are clearly related to "the letter and spirit of the Fourteenth Amendment"). It is significant, however, that none of these cases address (much less explain) why the

abrogation remedy is necessary or proportional to the generalized finding of discrimination. *See, e.g., id.* at 17a-22a.

A second group of decisions has interpreted *Boerne* more strictly. *See Humenansky*, 152 F.3d at 825-28; *Kimel*, 139 F.3d at 1445-1449 (Cox, J., concurring in part and dissenting in part); *Coolbaugh*, 136 F.3d at 440 (Smith, J., dissenting). Under these decisions, a statute is deemed to be "remedial" legislation only if two conditions are met. First, Congress must identify a documented pattern of constitutional violations by the States that would justify prohibiting constitutional state action. *See Boerne*, 117 S. Ct. at 2166-69; *see also Humenansky*, 152 F.3d at 827 (ruling that isolated instances of discrimination would not justify application of Section 5 power to prohibit constitutional state action); *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part) (the Americans with Disabilities Act is not valid enforcement legislation because it "was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies"). Second, the legislation must be a "congruent and proportional" response to the specific *constitutional violations identified. See Boerne*, 117 S. Ct. at 2164, 2169 ("the appropriateness of remedial measures must be considered in light of the evil presented"); *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part).[17]

As the latter cases recognize, the starting point for justifying any legislation that prohibits constitutional state action must be

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[17] The "disarray" noted by the Seventh Circuit is not limited to the circuit courts. *Compare Larry v. Board of Trustees of the Univ. of Alabama*, 975 F. Supp. 1447, 1449-50 (N.D. Ala. 1997) (holding that the Equal Pay Act is impermissible substantive legislation because it does not require a showing of intent as required by this Court's decision in *Washington v. Davis*) *with Belch v. Board of Regents of the Univ. Sys. of Georgia*, No. 3:94-CV-129(DF), 1998 WL 824497, *7-9 (M.D. Ga. Nov. 20, 1998) (holding that the Equal Pay Act is appropriate remedial legislation).

evidence of a pattern of actual *constitutional violations* by the States. *See, e.g., Humenansky*, 152 F.3d at 827; *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part). Private acts of discrimination do not implicate the Fourteenth Amendment, and as a result, generalized findings of societal discrimination are irrelevant to the Fourteenth Amendment inquiry. *See* U.S. CONST. amend. XIV (proscribing certain types of *state action*). They are certainly insufficient evidence for allowing Congress to legislate beyond the terms of the Fourteenth Amendment and in derogation of the Eleventh Amendment. *See id.* Furthermore, *Boerne* requires that any *remedy* must be carefully tailored to address identified constitutional violations. *See Boerne*, 117 S. Ct. at 2169; *Kimel*, 139 F.3d at 1446. A remedy cannot, therefore, be applied to the States as a by-product of statutes primarily designed to address private discrimination. *See Boerne*, 117 S. Ct. at 2164, 2168; *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part); *see also Coolbaugh*, 136 F.3d at 430, 440 (Smith, J., dissenting). Yet that is exactly what happened here.

2. The Disarray In The Circuits Needs To Be Resolved

The State of Illinois respectfully submits that the narrower interpretation of Congress' power under Section 5 (as reflected in the second group of decisions) is the only appropriate reading of this Court's previous rulings. As discussed above (*see* disc. *supra* at 18-20), the Voting Rights Act was and is the only statute prohibiting constitutional state action that the Supreme Court has ever approved in this century as an exercise of Fourteenth and Fifteenth Amendment authority. *See Boerne*, 117 S. Ct. at 2163. In that instance, this Court was driven by "exceptional" circumstances and the "extraordinary" need arising from the organized resistance *by the States themselves* to the extension of the right to vote. *See Katzenbach*, 383 U.S. at *passim*. Similarly, the remedies then at issue were tailored to

the specific constitutional violations by the States. *See*, *e.g.*, *id.* at 333-35.

Nothing in *Katzenbach* or its progeny, however, suggests or implies that prohibition of otherwise constitutional state conduct could be justified merely by demonstrating the widespread existence of private racial discrimination. Indeed, *Katzenbach* suggests just the opposite. *See Katzenbach*, 383 U.S. at 328-34 (holding there must be evidence of intentional action by the States that is designed to deprive citizens of their constitutional rights).[18]

Whatever the ultimate resolution of this issue is, the disarray in the lower courts must be addressed. The number of fractured and conflicting opinions continues to grow, affecting the basic constitutional rights of the States in hundreds of different lawsuits involving a spectrum of employment statutes. This Court has repeatedly recognized that the proper application of the Eleventh Amendment preserves the fundamental constitutional balance in our federal system. *See Atascadero*, 473 U.S. at 242. No question could be more important than resolving the confusion on this issue that currently reigns in the lower courts. *See*, *e.g.*, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 n.9 (1981) (granting certiorari when there is disagreement among the lower courts on an important issue of constitutional interpretation).

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[18] Application of the *Boerne* proportionality standard is, of course, also informed by the constitutional presumption against abrogation. As this Court stated in *Seminole Tribe*, the Eleventh Amendment embodies the presumption "that each State is a sovereign entity . . . [and] it is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent." *See Seminole Tribe*, 517 U.S. at 54; *see also Atascadero*, 473 U.S. at 243 (the Eleventh Amendment is a jurisdictional limitation). This presumption is just as applicable to *Boerne*'s proportionality inquiry as it is to the statutory construction inquiry in *Dellmuth* and *Atascadero*.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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